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Supreme Court of the United States

Term 1952

No. — 458

NEWTEX STEAMSHIP CORPORATION and SEATRAIN LINES, INCORPORATED,

Plaintiffs-Appellants,

against

THE UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Statement

The sole ground upon which the appellees move to affirm the judgment of the District Court is that no substantial Federal question is presented. Although the Jurisdictional Statement filed by appellants sets forth the principal issues involved upon which it is contended that the questions presented are substantial and upon which it is believed that the Decree of the Lower Court should be reversed, submission of this brief is deemed justified and

may be helpful to the Court in clarifying and understanding the misconceptions which appear in the appellees' motion to affirm.

Facts

The Lower Court Decree dismissed an action instituted by appellants to set aside an Order of the Interstate Commerce Commission.

By application filed April 3, 1970, the appellee, Pan-Atlantic Steamship Corporation, a common carrier by water, sought authority in competition with appellants to serve Houston and Galveston, Texas, in connection with and as an extension of its presently authorized operations between specific Atlantic and Gulf ports.

The Pan-Atlantic Steamship Corporation possesses authority to engage in 81 distinct water carrier services between 14 named ports. At the time of the oral argument before the Commission the said appellee had either failed to initiate or refuse to continue to maintain 35 distinct services for which it had been granted operating authority (pp. 951, 952, Commission Record).

The report of the two Commissioners, constituting the majority in favor of granting the said appellee's application, stated in part:

> "• • • Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade clearly would be unwarranted. Seatrain's competitive position seems secure, but a break-bulk service paralleling that now provided by Newtex may be expected to divert a part of the traffic now moving by that line. After substantial

> deficits in 1947 and 1948, Newtex realized modest profits in 1949 and 1950. Unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's operations probably would force Newtex into a deficit and conceivably retirement from the trade."

In coming to the conclusion that the said appellee was entitled to extend its operations, the majority report of the Commissioners relied on the additional service recently provided by one of the appellants, to which it added for support the *view* of the said appellee, Pan-Atlantic Steamship Corporation "that a vigorous solicitation program will aid materially in building up a substantial traffic volume", and the fact that the appellee had adequate equipment, facilities, personnel and finances "together with its past operations in the coastwise trade." (Sheets 15-16, Commission Report.)

The dissenting opinion of Commissioner Cross, however, found:

> "I dissent from the finding that the present and future public convenience and necessity require extension of applicant's presently authorized operations so as to include Houston and Galveston.
>
> Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade would be unwarranted. Therefore in order to justify the additional authority sought, there must be a clear showing that sufficient new tonnage can be developed to warrant the proposed additional operations. Applicant's evidence concerning the anticipated new tonnage to and from the Texas ports, in my judgment, is not sufficiently definite to

warrant the granting of the application. The majority here express the view that 'unless a substantially larger over-all volume of coastwise tonnage can be developed, extension of applicant's operations probably would force Newtex into a deficit and conceivably retirement from the trade.'

While applicant is here seeking authority to perform additional operations, the record shows that it does not now perform all the service for which it has operating authority. For example, it does not maintain service to or from Charleston; between Baltimore and Philadelphia, on the one hand, and Pensacola, on the other; between Boston, on the one hand, and New York, Philadelphia, and Baltimore, on the other; or from North Atlantic ports to Georgetown, S. C.

In my opinion, applicant is not entitled to the additional authority sought because it has failed to establish as required by the statute that the proposed service is or will be consistent with the public interest and the national transportation policy." (Sheet 17, Commission Report.)

Although the majority opinion of the District Court held that the ultimate conclusion of the Commission was based upon substantial evidence to support the basic findings, a vigorous dissenting opinion took the opposite view.

The dissenting opinion held that the basic findings made by the Commission were that (a) an additional line was unwarranted considering the current volume of coastwide tonnage; (b) a break-bulk service paralleling that of appellants may be expected to divert part of its traffic;

(c) appellant, Newtex, had substantial deficits in 1947 and 1948 and modest profits in 1949 and 1950; and (d) "unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's (Pan-Atlantic) operations probably would force Newtex into a deficit and conceivably retirement from the trade." These findings, the dissenting opinion held, show clearly that present public convenience and necessity was not served by the extension of authority granted to appellee, Pan-Atlantic.

The dissenting opinion in the Court below further held that the conclusion that future public convenience and necessity would be served was not supported by the basic findings, which were to the effect only that (a) the appellants' services do not fully meet the needs of shippers and the extension of operations sought *"would improve the situation"*; (b) "a break-bulk line providing regular dependable and reasonably frequent sailings will attract *additional* traffic"; (c) the view that "a vigorous solicitation program will aid materially in building up substantial traffic volume". As stated in the dissenting opinion, the last finding "can be accomplished by merely taking over the traffic now handled by Newtex and thus driving it out of business".

Issues

The issue presented by this appeal is whether the Commission's ultimate conclusion that the appellee Pan-Atlantic Steamship Corporation was entitled to the certificate extending its operations because "it is or will be required by the present or future public convenience and

necessity'' was founded upon adequate basic findings which are in turn supported by substantial evidence in the record.

Argument

Clearly this appeal can have no purpose to delay and no contention with respect thereto is made by the appellees. It is equally clear that questions of grave importance to the nation are presented for decision.

A certificate of public convenience and necessity may be issued under section 309(c) of the Act only when there is proof of public convenience and necessity. The term ''public'', so used, related not merely to the inhabitants of a particular city, state or geographical area but rather to the entire citizenry of the United States. *Interstate Commerce Commission* v. *Railway Labor Executives Ass'n.*, 315 U. S. 373, 377. While the needs of particular areas or classes of shippers must be given consideration, those needs must be viewed in the light of the much broader national sphere. *Colorado* v. *United States,* 271 U. S. 153, 168. The prime and ultimate consideration involved in the maintenance of an efficient national transportation system is the national interest.

The Congressional Mandate to the Commission, stated in the National Transportation Policy, is to ''foster sound economic conditions in transportation and among the several carriers'' and to prevent ''unfair or destructive competitive practices.'' It must be carried out in the administration of the Act and in the certification or refusal to certify proposed common carrier service by water. *Eastern Central*

Motor Carriers Association v. *United States*, 321 U. S. 194; *Barrett Line, Inc.* v. *United States*, 326 U. S. 179; *I. C. C.* v. *Parker*, 326 U. S. 60; *American Trucking Association* v. *United States*, 326 U. S. 77; *War Shipping Administration, T. A. Application*, 260 I. C. C. 589, 592. Accordingly, the national interest is of paramount importance in finding or failing to find the existence of "public convenience and necessity."

Unnecessary duplication of facilities is an economic waste, prejudicial to the national interests, *Purcel* v. *United States*, 315 U. S. 381; *Proposed Construction by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363; *Construction of Branches by Pittsburgh, L. & W. R. Co.*, 150 I. C. C. 43, however desirable to the duplicator or new carrier. Accordingly, even in the absence of objection by competing carriers, waste arising from unnecessary duplication is not permitted. *Construction of Line by Southern Kan. I. B. Ry. Co.*, 117 I. C. C. 210; *Motor Vanway, Inc.*, 17 M. C. C. 314.

It becomes evident from a review of the report of the Commission that there was and is adequacy of existing service sufficient to meet the public requirements At Sheet 15 of the report it was indicated: "Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade clearly would be unwarranted." This is merely another way of saying that the existing service is adequate and provides all of the transportation required by the trade. This finding inexorably demanded and required the concurrent finding by the Commission that the proposed service would create "unnecessary duplication of facilities" which "is an economic waste, prejudicial to the national interests."

As the Supreme Court stated in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 471, 474, "regulation (of railroads) involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures, which are unnecessary if free competition is to be permitted." Elimination of unwarranted and therefore wasteful competition is sought, even though existing carriers are thereby protected in the status quo, because "undue competition should not weaken all to the detriment or destruction of the quality and extent of the service to which the public was entitled." *Byers Transportation Co.*, 49 F. Supp. 828, 829. To allow new operators to enter a field in competition with existing operators who are furnishing adequate, efficient and economical service would jeopardize sound economic conditions among the carriers which the Commission is required by the National Transportation Policy to maintain in the public interest. *Clark Common Carrier Application*, 1 M. C. C. 445, 448; *Miller Extension of Operations*, 27 M. C. C. 731, 735.

In discussing the general policy of the Act, which requires protecting existing carriers from new competition, the Supreme Court summarized the problem as follows:

> "It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall on the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it

may be the public which ultimately bears the loss (citing cases). The act sought, among other things to avert such losses."

* * *

"* * * where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory, already adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. * * *" *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & S. F. Ry. Co.*, 270 U. S. 266, 277, 278.

"One of the most important duties of public regulation, indeed, is to bring transportation competition under proper control" since competition which goes beyond reasonable bounds is both wasteful and destructive in its results. *Missouri Pacific Transportation Co.*, 9 M. C. C. 712, 718.

In line with this principle and the underlying policy of the Act, the Commission has established the doctrine that existing carriers should normally be accorded the right to transport all the traffic they can handle adequately, efficiently and economically in the territory served by them, without the competition of a new service. *Contract Carriers, Inc.*, 41 M. C. C. 165, 170; *McCoy Truck Lines, Inc. Extension*, 26 M. C. C. 585, 589; *Holland Transportation Co. Extension*, 33 M. C. C. 558, 569; *Construction of Branches by Pittsburgh, L. & W. R. Co., supra.*

The existing carriers, unquestionably, can handle all traffic available at the ports which they are certificated to

serve. If there be augmentation of traffic in the future from and to such already certificated ports, these carriers not only are willing, ready and able to handle it but the construction of new Seatrain vessels offers adequate insurance as to their ability to handle that traffic. The law clearly requires that the existing lines be given the opportunity to augment and expand their service, as and if required, to meet any new or enlarged public need before the Commission certificates any new or additional service.

Competition is not justified at the price of wasteful or duplicate facilities or services. Public convenience and necessity may adequately be served by even a single existing carrier. When two competing carriers are available to the shipper, no question of monopoly arises. *Sabin Basin Ry. Co.*, 170 I. C. C. 653, 674. Even when service is provided by only a single carrier, there is no reason to admit a new carrier to the field merely to provide competitive service. *The Rock Island Motor Transit Company*, 33 M. C. C. 349, 357; *Brundage Common Carrier Application*, 11 M. C. C. 187, 190; *Construction by Aroostook Valley R. R.*, 105 I. C. C. 643; *Consolidated Motor Lines, Inc., Extension*, 18 M. C. C. 35, 44.

As pointed out in the Jurisdictional Statement filed by the appellants this appeal involves the deprivation of the property interest of the appellants and the avowed public policy of encouraging a National Maritime Service. The Commission's ultimate conclusions in the instant case are without evidentiary support and are contrary to its own basic findings as is definitely and distinctly set forth in both the dissenting opinion contained in the Commission's Report and in the Dissenting Opinion of the Court below.

CONCLUSION

The motion to affirm should be denied in order that this Court may pass upon the important issues here presented.

Respectfully submitted,

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Counsel for Plaintiffs-Appellants.

By S. S. Eisen

(GP—9472)

Certificate of Service

I certify that the foregoing Brief of Appellants in Opposition to the Motion to Affirm was served upon counsel for the parties in the case of *Newtex Steamship Corporation and Seatrain Lines, Incorporated* v. *United States of America, et al.*, Civil No. 73-60, United States District Court for the Southern District of New York, by mailing a true copy of said Brief to such counsel this 10th day of November, 1952.

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